user, and it is this fact which raises the presumption in law. Further, this very point is dealt with in the judgment of the Court of first instance at page 22, line 41. If necessary therefore the pleadings should be treated as amended so as to raise this point expressly, and I decide this case on that footing.

Some objection was made as to the form of the original decree. No objection appears to have been taken on this head in the lower appellate Court, and I do not see that it is essential to vary the form of the decree. In effect the injunction is intended to preserve the immemorial user.

In my judgment the appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice and Mr. Justice Kemp.

BAI NEMATBU, WIDOW OF MAHOMADALLI ABEDIN GYANI AND WIFE OF SHAIKH FAKRUDDIN KOTHARE (ORIGINAL OPPONENT,-DEFENDANT No. 1), APPELLANT *v.* BAI NEMATULLABU, WIDOW OF ABDUL TYAB ISMAILJI MASKATI (ORIGINAL APPLICANT, PLAINTIFF), RESPONDENT.*

Indian Limitation Act (IX of 1908), Sections 5 and 14—Delay—Sufficient cause—Review—Strict proof, meaning of—Civil Procedure Code (Act V of 1908), Order XLVII, rule 4, sub-clause (2) (b).

The plaintiff, a Mahomédan lady, applied for review of the judgment of the First Class Subordinate Judge, A. P., at Surat. Her appeal was dismissed by the Judge on October 8, 1915. The application for review was made on January 5, 1916 to the District Judge, Surat. This application to that Judge was irregular as before that the plaintiff had filed a second appeal to the High Court on November 10, 1915. After the withdrawal of the second appeal on March 29, 1916, the application of January 5, 1916 was transferred by the District Judge for disposal to the First Class Subordinate Judge. It was dismissed as being not properly made under Order XLVII, Rule (1) of the Civil

* Appeal from Order No. 48 of 1916.

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Procedure Code, 1908, to the Judge who passed the decree in appeal. The plaintiff, therefore, presented another application to the Subordinate Judge on May 6, 1916. On it being contended that it was barred by limitation,

Held, that the plaintiff had shown sufficient cause for excuse of delay under sections 5 and 14 of the Limitation Act, 1908.

Per BATCHELOR, AG. C. J.:—By 'strict proof' in Order XLVII, Rule 4, sub-clause (2) (*b*), Civil Procedure Code, 1908, is meant anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence...The words are, not that the absence of negligence shall be 'conclusively established' or even 'satisfactorily proved'. What is required is that there be strict proof of this absence of negligence on the record and the phrase 'strict proof' refers to the formal correctness of the evidence offered, not to its effect or result. If the record does contain such strict proof, that is to say, such formal admissible evidence, it shall be for the trial Court only to assess its sufficiency.

Ahid Khondkar v. *Mahendra Lal De*[1], approved of.

APPEAL against the order passed by G. R. Datar, First Class Subordinate Judge at Surat, in Review Application No. 63 of 1916.

Proceedings in Review.

The facts were as follows:—In the city of Surat, the plaintiff, a Mahomedan lady, and the defendant owned adjoining houses. In the rear of the plaintiff's house there was an open piece of ground which included a by-lane. The plaintiff claimed an immemorial right of way through the said by-lane, but the defendant having obstructed the plaintiff's use of the lane, she brought a suit claiming a permanent injunction restraining the defendant from blocking up the plaintiff's right of way over the lane. In the said suit after the case for the plaintiff was closed, a sheet map, Exhibit 129, was produced on behalf of the defendant showing a double line indicating an enclosure up to the eastern boundary of the plaintiff's house. The Subordinate Judge relying on the said sheet map and testing the evidence adduced on behalf of the plaintiff

[1] (1915) 42 Cal. 830 at p. 837.

in the light thereof, held that there stood a wall at one time extending up to the eastern boundary of the plaintiff's house and therefore there could not be a right of passage as claimed by the plaintiff.

Against the decree of the Subordinate Judge the plaintiff appealed to the District Judge at Surat. The appeal was, however, heard by the First Class Subordinate Judge, A. P., at Surat, who relying mainly upon the map (Exhibit 129) dismissed the same on October 8, 1915.

The plaintiff then preferred a second appeal to the High Court on November 10, 1915.

Before this, on October 16, 1915, the plaintiff began correspondence with the revenue authorities in order to procure documents with a view to test the accuracy of the defendant's map. These copies were received by her on January 4, 1916, and distinctly showed that there was no continuous double line to the eastern boundary of the plaintiff's house.

On the next day, i.e., January 5, 1916, she applied for review of judgment to the District Judge. She was, however, unable to proceed with this application immediately after the application was filed as the second appeal was pending. After consulting her legal advisers she withdrew the second appeal on March 29, 1916.

On April 1, 1916, the District Judge transferred the application of January 5, 1916, for disposal to the First Class Subordinate Judge. The learned Judge dismissed the application on May 5, 1916, on the ground that it was not made to the Judge who passed the decree and was, therefore, not according to law under Order XLVII, Rule 1 of the Civil Procedure Code, 1908.

The plaintiff, thereupon, presented another application for review on May 6, 1916.

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The defendant contended *inter alia* that the application was barred by time and that the applicant-plaintiff failed to prove want of due diligence.

The Subordinate Judge held that the delay caused in presenting the second application could be excused under sections 5 or 14 of the Indian Limitation Act, 1908, having regard to the circumstances under which it was caused. He was also of opinion that the applicant had no reason to believe that the mistake was committed only in the preparation of the sheet map and not in the original map of survey which must have formed the basis of the preparation of the sheet map and therefore the applicant could not be blamed for not having exercised more diligence. He, therefore, granted the review application.

The defendant appealed to the High Court.

Setalvad with *G. N. Thakor* for the appellant:—The petition for review is beyond time. The first application which was made to the District Court having been presented to the wrong Court, the only application before the Court was the second one. It was clearly beyond time since it was presented after 90 days. There was no *bona fide* mistake in presenting the first application to the District Court instead of to the Judge who heard the appeal. The object was to gain time until the second appeal which was filed against the decree of the appellate Court was withdrawn. The application being made during the pendency of the second appeal was bad in law and therefore the lower Court erred in excusing delay under sections 5 or 14 of the Limitation Act, 1908. There was no occasion for the exercise of the discretion under these sections.

Secondly, the lower Court was wrong in granting the review without strict proof of the allegation about the

absence of knowledge of the evidence at the trial. The evidence on which the review was granted was not new and important matter. The petitioner could have produced that evidence at the hearing. It cannot be said that the petitioner had no knowledge of the existence of the map at the time of the trial. She has failed to exercise due diligence in making the necessary inquiries. The Court should have asked for strict proof as provided for by Order XLVII, Rule (4) (2) (*b*) of the Civil Procedure Code, 1908, and satisfied itself whether the petitioner's allegations were true or not. The Court has failed to follow those provisions. This Court can, therefore, see whether there existed any grounds for granting the review and whether there was strict proof of such grounds. [At this stage while the counsel was addressing the Court on the merits of the application, Mr. Strangman, Advocate General, for the respondent, objected by saying that the Court could not go into the merits of the application but it had only to see whether certain formalities provided for by Order XLVII, Rule (4) (2) (*b*) were observed or not and cited *Ahid Khondkar* v. *Mahendra Lal De*[1].]

We can go into merits as the section itself did not prevent us doing so. It did not confine itself to mere formalities but merits also. Then there is nothing in the section to prevent the appellate Court from going into the merits and examining whether the lower Court has sufficient grounds for allowing the application for review: *Kessowji Issur* v. *G. I. P. Railway Company*[2].

Strangman, Advocate General, and *Bhulabhai J. Desai* with *N. K. Mehta* and *M. B. Dave* for the respondent, not called upon.

BATCHELOR, AG. C. J.:—This is an appeal brought by the original 1st defendant against an order made by

[1] (1915) 42 Cal. 830 at p. 837 [2] (1907) 31 Bom. 381.

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the learned First Class Subordinate Judge granting to the plaintiff a review of the Subordinate Judge's judgment. I am of opinion that the learned Judge below was perfectly right in allowing this application for review of judgment, and indeed I think that he was compelled *ex debito justitiæ* to make such an order in the circumstances of this case. The plaintiff, who was the applicant for the review, was a Mahomedan female, belonging, therefore, to that category of persons, who, according to a well known description by a Chief Justice of this Court, are barely to be described as *sui juris*. It is plain on the record, and indeed it has formed part of Mr. Setalvad's argument for the appellant, that this Mahomedan lady's legal interests were not prosecuted by her advisers with all the carefulness which the circumstances demanded. It is that want of carefulness which has caused the delays upon which the appellant now mainly founds. When those delays are examined, I think it will be seen that all that we have here is not any actual delay in fact, but a kind of constructive delay imputed to the appellant by reason that certain applications made from time to time by her legal advisers were not applications valid and efficient under the law. For instance, the plaintiff's appeal was dismissed by the appellate Court on the 8th October 1915. One reason, perhaps one of the main reasons, upon which the order of dismissal was made, was the appearance of a certain map relied upon by the present appellant, for that map showed a continuous double line which, if it had existed in the original Survey map of about 1870, would have gone far to disprove the plaintiff's claim to an easement. But, on the 16th October 1915, the plaintiff began correspondence with the revenue authorities in order to procure documents with a view to test the accuracy of the appellant's map, Exhibit 129. These copies were received by her on the

4th January 1916, and on the very next day she applied for review of judgment to the District Judge. Unfortunately through no fault of the Mahomedan lady, but through some want of attention on the part of her legal advisers, this application was irregular, seeing that there was then still pending before the Court the second appeal which had been lodged on behalf of the plaintiff on the 10th of November 1915. That is an instance of the kind of delay which, as I say, is imputed against the plaintiff in these proceedings. Assuming, therefore, that in strictness the application for review was out of time, it appears to me clearly to be a case which calls for the concession allowed by section 5 and section 14 of the Indian Limitation Act. Upon this point, it seems to me relevant also to say that when all argument is exhausted, the real object of this application is, as the learned trial Judge pointed out, not so much to improve the plaintiff's case by the addition of fresh evidence, but to ensure that the judgment of the Court shall proceed upon true materials and not upon false.

Then it was urged by Mr. Setalvad that the lower Court was wrong in allowing the application because the condition prescribed by Order XLVII, Rule 4, Subrule (2) (*b*) is not satisfied in this case. That condition is expressed in the following words "No such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation." The learned counsel contends that if the evidence tendered upon this point by the applicant in the Court below be subjected to examination in this Court of appeal, it will be found that such evidence ought not to have satisfied the Court of that absence of negligence which the Code

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requires. This argument, however, runs counter to the decision of the Calcutta High Court in *Ahid Khondkar* v. *Mahendra Lal De*[1], where the provisions of section 626 of the Code of 1882, which correspond with the provisions of the Order now under consideration, were examined and discussed by Sir Lawrence Jenkins C. J. and Mr. Justice Woodroffe. Sir Lawrence Jenkins there says: "The view taken by Mr. Justice Chatterjea in affirming the lower appellate Court is that 'strict proof' means proof that convinced the lower appellate Court, and it is on that ground, and on that ground alone, that the result can be affirmed. In my opinion, this is not the true view of the provisions of this chapter relating to review of judgments. The word 'proof' ordinarily has one of two meanings: either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of the word 'strict' seems to me to point to the second of these two meanings, and 'strict proof,' in my opinion, means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality which is prescribed, and not the result that is described. This, I think, is apparent from the whole scheme of this chapter on review"; and Mr. Justice Woodroffe's judgment was to the same effect. No doubt that decision is not strictly binding upon us, and equally without doubt it is a decision which is entitled to the highest respect. Speaking for myself, I entirely concur in the construction which has been placed upon these provisions by the decision of the Calcutta High Court, and that construction appears to me to be probable in itself, when it is remembered that the order in question is merely a

[1] (1915) 42 Cal. 830 at p. 837.

discretionary order where large powers would naturally be confided by the Legislature to the Judge of first instance. Then, I think that the use of the somewhat curious words "strict proof" also confirms the construction which was adopted. The words are, not that the absence of negligence shall be "conclusively established" or even "satisfactorily proved". What is required, as I understand it, is that there be strict proof of this absence of negligence on the record and the phrase "strict proof" refers, I think, to the formal correctness of the evidence offered, not to its effect or result. I can see nothing repugnant in supposing that if the record does contain such strict proof, that is to say, such formal admissible evidence, it shall be for the trial Court only to assess its sufficiency. At first sight no doubt it might seem that the word "strict" is tautologous inasmuch as all proof must be strict proof. But it seems to me that there was good reason for the insertion of the epithet, and that the desire of the Legislature was to deter subordinate Courts from acting upon loose information or inadmissible evidence upon which they are at times disposed to act in these matters. There is no question but that on the record in this case there is strict proof which, if it be believed, is sufficient to discharge the burden which lay upon the applicant of showing that she was not guilty of negligence in not collecting earlier the evidence upon which she now wishes to rely.

On these grounds it seems to me that the order made by the lower Court is right and I would affirm it, dismissing this appeal with costs.

KEMP, J. :—I agree with my Lord the Chief Justice as to the point of limitation. I think sufficient cause has been shown by the respondent for the delay in making her application to review.

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With regard to the question as to what the scope of the enquiry which the appellate Court should enter upon is, I am of opinion, that we are entitled to satisfy ourselves under Order XLVII, Rule 4 (2) (*b*), as to whether there was sufficient evidence before the lower Court, and whether such evidence has been properly appreciated by it when it granted the application. If *Ahid Khondkar* v. *Mahendra Lal De*[1] lays down that the duty of the appellate Court is restricted to ascertaining whether the evidence adduced before the Subordinate Judge is properly admissible or not, only I must respectfully beg leave to doubt its correctness. The Subordinate Judge might grant such an application on evidence on the weight and sufficiency of which no appellate Court would agree with him. Nevertheless, the evidence which the plaintiff-respondent now seeks to adduce is not for the purpose of adding to her evidence in the Court below, but for the purpose of correcting a misapprehension into which the Judge was led by a material error in Exhibit 129. I, therefore, think that under these circumstances justice requires its admission and that this appeal should be dismissed with costs.

Order affirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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January 11.

SUBRAYA VENKAPPA HEGDE (ORIGINAL OPPONENT), APPELLANT *v.* SUBRAYA HEGDE (ORIGINAL APPLICANT), RESPONDENT.*

Instalment decree—Penalty clause—Failure to pay two instalments making the whole decree payable at once—First instalment not paid on due date, but paid up before the second one fell due—Second instalment not paid on due date—Penalty clause not becoming operative.

[1] (1915) 42 Cal. 830 at p. 837.

* Second Appeal No. 232 of 1917.